

**MDOT RESPONSE TO DLS ANALYSIS**

***DLS Major Issues – PAYGO Capital***

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- 1. DLS recommends that MDOT comment on what impact earmarks have had on the CTP (Page 21)**

**MDOT Response:**

**Nationwide:**

The legislation will provide at least \$286.4 billion in highway, transit, and safety programs for the six-year period FY 2004 through FY 2009. This is a significant increase over the level in TEA-21 that provided \$218 billion over the six-year period FY 1998 – 2003. Approximately 95 percent of the highway funds will be apportioned to the states under formula. For transit, almost 70% of the funding will be apportioned by formula with the remaining 30%+ distributed as discretionary new starts, bus and bus facilities, overhead and research. Highway safety funding almost doubles compared to TEA-21 levels. All states rate of return in the highway program will increase to 92% by 2009 - in the past the limit for rate of return was 90.5%.

**Maryland:**

Maryland will see an increase in both highway and transit funds as a result of the legislation. About 50% of Maryland DOT's total capital transit and highway program is federal funded. Of that, about 95% of the federal highway funds are determined by formula, yet only about 50-70% of the federal transit funds are determined by formula – the rest is discretionary and subject to earmarks and appropriations.

While the new bill provides a significant increase in funding for Maryland, it is important to note that this is NOT necessarily all new money. Every year our Consolidated Transportation Program (CTP) allocates federal funds to projects already in the program based on conservative assumptions. All of the dollars in those assumptions are already programmed into projects in the approved CTP. The majority of the new additional funds will likely be used for projects already in the program and unfunded system preservation needs. In many cases, it will help us deliver projects we have already agreed on. At this time, we are also dealing with how to pay for the increased cost of staying in business – especially with increased cost of fuel, as well as increased cost of commodity prices in asphalt, cement, steel and aggregate. Thanks to conservative forecasting we should be able to accommodate these increasing costs and carry out the capital program we have planned.

## J00 – MDOT Overview

### MDOT RESPONSE TO DLS ANALYSIS

#### *DLS Major Issues – PAYGO Capital, continued*

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##### **Impacts of Earmarks:**

SAFETEA-LU included over 6,300 project earmarks – over 9% of the total nationwide funding. This is a critical issue for all states. Some states are actually faced with cutting their adopted capital program because of the “priorities” established in Washington through earmarks (Maine’s Governor indicated he was proposing to cut over \$100 million from his capital program), or unexpectedly needing to issue more bonds to accommodate needs and earmarks (the Kansas Secretary of Transportation announced a need to issue another \$200 million in bonds). While earmarking funds in Washington is not a new practice, it is one that has grown to disturbing levels.

In the 1982 authorization bill – there were a total of 10 earmarks

In 1987 – 1991 - \$1.78 billion for 152 earmarks

In 1992-1997 (ISTEA) - \$7.2 billion for 572 projects

In 1998-2003 (TEA-21) - \$9.4 billion for 1,850 projects

HR 3 – SAFETEA-LU – \$24 billion for 6,371 projects - over 9% of the total bill.

It is important to understand that the majority of these project earmarks do not provide more money. Federal reauthorization legislation establishes formulas for states to equitably qualify for funding. Formulas are based on things such as lane miles, population and vehicle miles traveled or how much gasoline tax is actually collected. Most of the earmarks infringe on those formula funds and determine how a state’s regular highway funding must be spent. They do not bring more federal dollars to the state.

Another concern about expanding earmarks is that they direct where to spend the money – regardless of the planning process - including priorities set by local governments and MPOs. Earmarks can reduce flexibility to use formula funds to meet the priorities established in the planning process. The real dilemma for DOTs is that earmarked money is not always sent to where it is needed the most. And at times, either due to lack of complete funding, lack of local support, or due to competing needs, the earmarked money is not spent. According to the U.S. General Accounting Office (GAO), on a national level, slightly more than 64% of the funds for “high priority” projects within the 1987 transportation reauthorization legislation – or 66 of the 152 projects - were not obligated – despite the fact that the government would cover 80% of the cost. In the 1991 ISTEA bill, nearly half of the earmarked money went unspent. (Maryland has obligated all of its ISTEA and TEA-21 earmarks). The GAO found that half of the earmarked projects were not included in the state transportation plans. The GAO also reported that many of the earmarks that did address real state and local mobility needs were not undertaken because the total project costs were too expensive to implement, and the earmarked funds significantly understated the actual cost of the project.

## J00 – MDOT Overview

### MDOT RESPONSE TO DLS ANALYSIS

#### *DLS Major Issues – PAYGO Capital, continued*

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##### Maryland Impacts:

SAFETEA-LU earmarked just under 10% of Maryland's highway formula funds – slightly higher than the national average. The earmarks were not all bad or wrongly directed - several were for projects supported by MDOT and Metropolitan Planning Organizations (MPOs). A few project earmarks for MD were outside the formula funding such as the \$15 million to support Base Realignment and Closing (BRAC) projects and \$10 million for the ICC – and those truly are EXTRA money. But over \$100 million in funds were directed to projects not included, or projected to be included, in the CTP.

Valuable federal highway formula dollars are now directed to projects such as \$15.6 million for land conservation project on the Eastern Shore, \$11 million for a new Visitor Center for the National Park Service at Ft. McHenry, and another \$6.3 million to construct a new visitor center for the Park Service at Assateague National Seashore. Of the 22 earmarks in Baltimore City, almost half were for projects the City had not planned to pursue.

Maryland's 92 highway earmarks in SAFETEA-LU totaled \$307.7 million: 48 were for State projects in the Maryland Consolidated Transportation Program totaling \$205.7 million. The remaining formula funds were diverted to 22 projects located in Baltimore City totaling \$55.5 million; and for 21 projects outside of our program totaling \$46.6 million for a total of \$102 million. (one earmark was for US DOT to study the I-95/Contee Road Interchange).

On the transit side, the earmarking is done in the discretionary programs such as New Starts and Bus Funding. However, because each state is only allocated a certain portion of the Bus funding (depending on the congressional delegation seniority, leadership position and party), this additional earmarking cuts into a limited pot of money. In the past, Maryland has sought a statewide earmark for Bus funding. Those funds are then shared between the MTA and local transit systems through Local Transit Grants. However, in SAFETEA-LU, there were several local earmarks resulting in less funding for both the MTA and the local transit grants. As a result, the Maryland Statewide funds were only \$25 million. However, the Silver Spring Transit Center earmark sought by Montgomery County received over \$21 million. Howard County received just under \$5 million. Again, increased single project earmarks have reduced the funds available to local transit systems across the state as well as the MTA.

Finally, use of any federal funds requires compliance with all federal rules and policies. Some of the project sponsors are surprised to learn that use of funds requires full compliance all federal requirements including NEPA, ADA, and other federal planning process rules. In some cases, after further examination, one earmarked project was found not to be eligible to use the funds due to non-compliance issues (a local road project in Rockville). The money will not be transferable without a specific legislative change. Federal law prohibits us from using the money for any other use.

MDOT RESPONSE TO DLS ANALYSIS

*DLS Major Issues – PAYGO Capital, continued*

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- 2(A). **DLS recommends that MDOT discuss the role and need of the private sector in the development of transportation infrastructure. In addition, MDOT should discuss the role of legislative oversight of public private partnerships agreements (Page 23)**

**MDOT/MdTA Response:** Transportation infrastructure needs in Maryland are great, and growing, and capital funding continues to be constrained. Maryland has a strong Transportation Trust Fund and a strong independent Authority to oversee its toll facilities, but traditional public sector resources have their limits. Meanwhile, traffic congestion is spreading to more facilities, and to more hours of the day. There are projects in the MDOT Development and Evaluation Program, such as I-495, I-95, and I-270 that cannot be built without significant financial resources. Maryland may benefit from additional private sector participation in order to support economic growth and advance Maryland transportation facilities ahead of the growth curve. MDOT is not financially strapped, but faces funding challenges daily to meet mobility needs. Virginia and other states are adding new facilities using P3 arrangements, so Maryland is examining the potential of P3 highway development to contribute to our development plans.

MDOT and the Maryland Transportation Authority (MdTA) have experience and a solid reputation in both project development and procurement. The project development processes adhere to extensive Federal and State statutes and regulations that include intensive public and legislative involvement. Highway project development must follow State and Federal requirements that include public notice and participation at several phases, normally over several years. This includes the annual CTP publication process that provides legislative opportunity to review and comment twice a year; once during the Tour each Fall and again when the CTP is presented to the Legislature in January of each year. It also includes requirements that legislators and local elected officials from the jurisdictions in which a project is located be given review and comment responsibility as well as veto authority under certain circumstances during the project planning phase.

All procurement processes follow Federal and State statutes and regulations. These include State goals for and Minority Business Enterprise (MBE) and Disadvantaged Business Enterprise (DBE) participation and full disclosure of all terms and conditions to ensure a transparent, fair and competitive procurement process. The recently enacted “Notification” requirement for Authority revenue-producing facilities further strengthens this oversight because notification will happen when the agency is getting serious about contracting for a toll facility, which may or may not involve entering into a public-private partnership (P3).

MDOT RESPONSE TO DLS ANALYSIS

***DLS Major Issues – PAYGO Capital, continued***

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Nationally, there is considerable evidence to suggest that legislative approval at the end of the process is counter-productive. The Florida legislature recently eliminated project approval from its P3 process after finding it to be a barrier to private investment. None of the three states studied by MDOT and MdTA for P3 best practices included legislative project approval. FHWA does not incorporate such a provision in its model P3 legislation.

The Authority has done its homework on highway P3 practices. Over the last year and a-half the Authority partnered with MDOT and FHWA to conduct research on best practices, issued a Report to members of the General Assembly staff and other stakeholders (*Current Practices in Public-Private Partnerships for Highways*) on P3, and is moving cautiously to develop appropriate practices to partner with the private sector for highway projects. Indeed Maryland has experience in a number of non-highway P3 projects, such as transit oriented developments and projects at BWI Thurgood Marshall Airport. Study Findings show that states that have been successful in attracting private partners and developing new partners do have substantial public involvement and oversight, new construction projects follow the normal and extensive highway planning procedures and would be included in capital plans (for either MdTA or SHA). Three States with the most active P3 programs, California, Texas, and Virginia, have public involvement but do not have legislative approval of individual projects.

**2(B). DLS also recommends that the General Assembly consider legislation that would establish a statutory framework for legislative oversight of public-private partnerships relating to transportation facilities. (Page 23)**

**MDOT/MdTA Response:**

MDOT agencies currently have the ability to solicit and enter into P3 arrangements for transportation facilities following existing development and procurement statutes and regulations. This ability has been used to benefit Maryland at BWI, the Port of Baltimore, and for a number of transit facilities. With regard to highway P3s, other States generally have to create a P3 framework because there was no statewide tolling authority in place, but Maryland has the MdTA. The Maryland notification provision passed last year applies to all MdTA revenue-producing transportation facilities projects; and any P3 development relying on tolls collected by private partners would require a MdTA contract or agreement. Hence, there is no possibility that a private entity could embark on a toll collection project on its own.

**MDOT RESPONSE TO DLS ANALYSIS**

***DLS Major Issues – PAYGO Capital, continued***

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Statutory framework through new legislation is not necessary to embark on partnerships. While the legal framework is not formally outlined in statute, the current basis for a prospective MdTA solicitation for a highway transportation public-private partnership is based on statute and was clarified in an Attorney General's Opinion {81. Op. Att'y Gen. – (Feb. 2, 1996)}. The Maryland Transportation Authority has state-wide tolling authority and there exists significant oversight and notification in place now for both the development and procurement process. This issue has been debated by legislative committees in past sessions, most recently in 2004 (SB 596), but no action has been taken.

MdTA research shows that a key lesson learned from successful State programs is that the approval of individual projects by a State legislature creates uncertainties, delays, and will drive away the private capital being sought to expand Maryland road facilities. It is important to note that there are extensive state and federal public notice and public involvement requirements involved whenever a major infrastructure improvement project is being developed. These include, of course, extensive environmental impact reviews and discussions that can take several years to complete, leading to an official and public Record of Decision, all with high levels of transparency. A recent project schedule for a prospective project including NEPA was expected to occupy at least 26 months, including scoping meetings, public workshops, focus groups, draft technical reports, selection of alternates retained for detailed study, and so on to the draft and final Record of Decision.

Finally, in MdTA's view, most P3 process guidance is based on existing procurement law rather than specific statutes and regulations directed at public-private partnerships. A P3 relationship will involve public notices, request for qualifications and proposals, evaluations and other procedures that provide numerous opportunities for transparency and public and legislative oversight.

MDOT and the Authority welcome the opportunity to discuss this issue further. Since sending out a notice of the P3 best practices report in August, Authority staff members have been invited to several meetings with legislative analysts, Senators and one House delegation to review the findings and discuss recent trends in the United States. The full report can be found on the Authority website [www.mdt.state.md.us](http://www.mdt.state.md.us) under the tab for public private partnerships.

## J00 – MDOT Overview

### MDOT RESPONSE TO DLS ANALYSIS

#### *DLS Major Issues – PAYGO Capital, continued*

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- 3(A). **DLS recommends that MDOT should address the issue of whether the \$25.8 million in one-time grants to the locals and the \$3.5 million for projects in Towson and Rockville will be released in fiscal 2006 (Page 25)**

#### **MDOT Response:**

During the 2005 Legislative Session, the General Assembly reduced funding for the Highway User Program by \$48.5 million and transferred the funds to the General Fund. To compensate for the reduction in aid to local jurisdictions, the General Assembly restricted \$25.8 million in funds intended for the Community Safety and Enhancement Program (CSEP) for use as one-time grants to local jurisdictions. These grants were to come from the TTF revenues not highway user revenues. This action significantly reduced funding for CSEP and required MDOT to spend funds intended for one program for another purpose.

The General Assembly permitted MDOT to restore \$12.2 million for the CSEP program if special fund revenues for fiscal 2005 exceeded \$1.987 billion. Due to significant legislative requests after the close of the 2005 session, MDOT made the CSEP projects a priority. However due to the delay in restarting those projects, several are now expected to be funded in early fiscal 2007.

Added to the funds not restricted by the legislature, \$5.5 million, MDOT expects to expend \$17.7 million in fiscal 2006 on CSEP. This amount represents full funding for the CSEP program in fiscal 2006 of all projects ready for funding. The projects that are not expected to be ready for funding by the end of FY 2006 will be funded in early FY 2007.

	<b>CSEP</b>	<b>HUR</b>	<b>TTF</b>
Highway User Revenue Allowance As Introduced		\$554,111,000	
Legislative Reduction To HUR		(48,500,000)	
BRFA – State Vehicle Exemption from Fuel Tax		(538,000)	
CSEP Allowance	\$31,300,000		
One-time Grant to Local Jurisdictions	(25,800,000 )		25,800,000
Specific Capital Projects	(3,500,000)		
Amounts Restricted from Special Capital Programs	3,500,000		
<b>Total 2006 Legislative Appropriation for CSEP and HUR, and One-Time Grants</b>	<b>\$5,500,000</b>	<b>\$505,610,000</b>	<b>25,800,000</b>
Budget Amendment to Fully Fund CSEP	\$12,200,000		
<b>Total Fiscal 2006 Funding</b>	<b>\$17,700,000</b>	<b>505,610,000</b>	<b>0</b>

## J00 – MDOT Overview

### MDOT RESPONSE TO DLS ANALYSIS

#### *DLS Major Issues – PAYGO Capital, continued*

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MDOT respectfully does not agree that Transportation Trust Fund revenues have increased at such a pace as to allow us to fully fund CSEP and the one-time grants. While the Department expects to receive more federal aid and corporate income tax revenues than previously estimated, MDOT has also experienced some significant decreases in other major revenues and unexpected increases in expenditures that render those “new found” dollars spent.

As fiscal 2005 came to a close, motor fuel tax and titling tax revenue collections missed their estimates by \$25 million. That slowing in revenue receipts is projected to continue through fiscal 2006 making the shortfall in these two categories \$50 million. Thankfully the slowing trend is not expected to continue into fiscal 2007 and beyond, but the damage was done and the \$50 million “hole” had to be dealt with first.

Further compounding the impact of these revenue losses, costs of materials has dramatically increased putting additional pressure on the budget and negating the ability of the Department to program any “new” revenues for new projects or one-time grants. Fuel prices for transit and highway vehicles have increased; as well as, the cost of construction materials. The cost of asphalt, steel, cement and aggregate (used for roadwork) has increased significantly.

While MDOT has programmed additional federal aid as a result of the SAFETEA-LU bill, these funds cannot be used for local projects. In addition, MDOT must match these federal funds with State money. Assuming an 80/20 match for the federal aid, approximately \$25 million in special funds is needed to match the \$111 million federal fund increase in fiscal 2006. In fiscal 2007, approximately \$15 million is needed to match the \$58 million increase in federal aid. No additional funds are “freed up” making it impossible to increase spending on local priorities. Also the federal aid will be spent on projects in each jurisdiction so indirectly the federal aid increases will benefit the local jurisdictions. As a result, the increased federal aid was not so dramatic an increase as to allow us to fund both CSEP and the one-time grants.

For these reasons, the Department does not expect to be able to fund the one-time grants also included in the fiscal 2006 budget. The Department is committed to the CSEP program, but MDOT does not have sufficient resources to fund both CSEP projects and the one-time grants.

With respect to the fiscal 2007 budget, MDOT respectfully asks for full funding for the highway user revenue program and for CSEP projects to avoid any future concerns with local transportation funding. The Governor's budget restores full funding for these programs and a reduction by the legislature would only undermine the integrity of funding for local transportation projects.



MDOT RESPONSE TO DLS ANALYSIS

*DLS Major Issues – PAYGO Capital*

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- 3(B). **DLS recommends that reductions, which would save an additional \$29.3 million over the program period, should be adopted to the fiscal 2007 allowance to recognize the legally restricted funds, which cannot be reallocated to other purposes. DLS will offer specific recommendations within the budget analyses of each mode (Page 26)**

**MDOT Response:**

MDOT respectfully does not concur with the DLS recommendation. The General Assembly reduced the fiscal 2006 appropriation by \$29.3 million contingent on MDOT spending the funds as one-time grants. Since MDOT will not be making the grants to the local jurisdictions due to lack of sufficient resources, the funds were to be deleted from the appropriation.

MDOT maintains a \$100 million working fund balance throughout the year to provide sufficient cash on a day-to-day basis to operate the department. When MDOT made the decision to not fund the one-time grants, the funds became available for use in the fund balance. All funds are fungible within the Transportation Trust Fund and because of the structure of the working fund these specific funds were blended in as part of the \$100 million balance.

MDOT could have maintained a higher fund balance showing the contingent reduction as unspent funds or could have reduced its total fund balance; however, this action did not seem fiscally prudent. Maintaining a higher fund balance would have required the Department to sell \$30 million more in bonds than were truly needed to cover expenditures. In addition, the Department would have incurred interest expense sooner than necessary.

MDOT also respectfully disagrees with the suggestion that capital projects should be reduced from the fiscal 2007 budget as a consequence of the Department not funding the one-time grants in fiscal 2006. The MDOT capital program is developed in conjunction with local officials and the General Assembly and reflects these priorities. Deleting capital projects in fiscal 2007 will only compound the problem of funding for local transportation projects.

MDOT RESPONSE TO DLS ANALYSIS

*Recommended Actions*

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**1. Add annual language requiring notification of changes to the transportation capital program (Page 34):**

It is the intent of the General Assembly that projects and funding levels appropriated for capital projects, as well as total estimated project costs within the Consolidated Transportation Program (CTP), shall be expended in accordance with the plan approved during the legislative session. The department shall prepare a report to notify the budget committees of the proposed changes in the event the department modifies the program to:

- (1) Add a new project to the construction program or development and evaluation program meeting the definition of a “major project” under Section 2-103.1 of the Transportation Article which was not previously contained within a plan reviewed in a prior year by the General Assembly and will result in the need to expend funds in the current budget year; or
- (2) Change the scope of a project in the construction program or development and evaluation program meeting the definition of “major project” under Section 2-103.1 of the Transportation Article which will result in an increase of more than 10 percent or \$1,000,000, whichever is greater, in the total project costs as reviewed by the General Assembly during a prior session.

For each change, the report shall identify the project title, justification for adding the new project or modifying the scope of the existing project, current year funding levels, and the total project cost as approved by the General Assembly during the prior session compared with the proposed current year funding and total project cost estimate resulting from the project addition or change in scope.

Notification of changes in scope shall be made to the General Assembly concurrent with the submission of the draft and final CTP. Notification of new construction project additions, as outlined in paragraph (1) above, shall be made the General Assembly prior to the expenditure of funds or the submission of any contract for approval to the Board of Public Works.

**MDOT Response:** MDOT concurs to the recommended language.

MDOT RESPONSE TO DLS ANALYSIS

*Recommended Actions, continued*

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**2. Add annual language limiting non-transportation expenditures (Page 35).**

It is the intent of the General Assembly that funds dedicated to the Transportation Trust Fund shall be applied to purposes bearing direct relation to the State transportation program, unless directed otherwise by legislation. To implement this intent for the Maryland Department of Transportation in fiscal 2007, no commitment of funds in excess of \$250,000 may be made nor such as an amount may be transferred, by budget amendment or otherwise, for any project or purpose not normally arising in connection with the ordinary ongoing operation of the department and not contemplated in the budget approved or the last published *Consolidated Transportation Program* without the 45-day review and comment by the budget committees.

**MDOT Response:** MDOT concurs to the recommended language.

MDOT RESPONSE TO DLS ANALYSIS

*Recommended Actions, continued*

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**3. Add annual language establishing a position ceiling in the department (Page 35).**

The Maryland Department of Transportation (MDOT) shall not expend funds on any job or position of employment approved in this budget in excess of \_\_\_\_\_ positions and \_\_\_\_\_ contractual full-time equivalents paid through special payments payroll (defined as the quotient of the sum of the hours worked by all such employees in the fiscal year divided by 2,080 hours) of the total authorized amount established in the budget for MDOT at any one time during fiscal 2007. The level of how many contractual full-time equivalents may be exceeded only if MDOT notifies the budget committees of the need and justification for additional contractual personnel due to:

- (1) business growth at the Port of Baltimore and Baltimore-Washington International Thurgood Marshall Airport which demands additional personnel; or
- (2) emergency needs which must be met (such as transit security or highway maintenance).

The Secretary shall use the authority under Section 2-101 and 2-102 of the Transportation Article to implement this provision. However, any authorized job or position to be filled above the regular position ceiling approved by the Board of Public Works shall count against the Rule of 50 imposed by the General Assembly. The establishment of new jobs or positions of employment not authorized in the fiscal 2007 budget shall be subject to Section 7-236 of the State Finance and Procurement Article, and the Rule of 50.

**MDOT Response:** MDOT respectfully disagrees with this recommendation. Additional positions limits are unnecessary as other provisions of annual budget bill language restrict the Department's ability to add positions without legislative oversight. The "Rule of 50" limits every agency's ability to add positions and requires approval of the Board of Public Works. The Department has no choice but to get the work done. Position caps and cuts force MDOT to replace State workers with more costly contractual services or to overburden our existing workforce who have borne the brunt of tough economic times and past position reductions.